

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

COLE'S WEXFORD HOTEL, INC.,
on its own behalf and on behalf of all others
similarly situated,

Plaintiffs,

v.

UPMC and HIGHMARK INC.,

Defendants.

Civil Action No. 2:10-cv-01609-JFC

Judge Joy Flowers Conti

Electronically Filed

**PLAINTIFF'S AND UPMC'S MOTION FOR LEAVE
TO FILE A REPLY IN SUPPORT OF THEIR MOTION FOR
PRELIMINARY APPROVAL OF SETTLEMENT AND RELATED MATTERS**

Plaintiff and UPMC, pursuant to this Court's rules, respectfully move for leave to file a reply in support of their Supplemental Brief in Support of the Motion for Preliminary Approval of Settlement and Related Matters (Dkt. 361). This reply brief will respond to the new arguments raised in Highmark's March 30, 2016 brief objecting to the Most Favored Nation ("MFN") clause in the settlement agreement between Plaintiff and UPMC.

1. On March 17, 2016, the Court held a hearing on Plaintiff's and UPMC's Motion for Preliminary Approval of Settlement and Related Matters. At the hearing, the Court discussed the MFN clause with Plaintiff and UPMC, and ordered Plaintiff and UPMC to file a supplemental brief discussing the permissibility of the MFN clause in their settlement agreement.

2. Although Highmark was present at the hearing, it had previously disclaimed objection to the settlement and did not indicate at the hearing that it was planning to object to the MFN clause or to file a response to Plaintiff's and UPMC's supplemental brief.

3. On March 24, 2016, pursuant to the Court's order, Plaintiff and UPMC filed their supplemental brief in support of approving the MFN clause. *See* Dkt. No. 361.

4. On March 30, 2016, without prior notice to the parties, Highmark filed a response to Plaintiff's and UPMC's supplemental brief, asserting that it had standing to challenge the MFN clause and offering arguments against approving that clause. *See* Dkt. No. 364.

5. Highmark's response raises several new issues, including whether Highmark has standing to challenge the MFN clause. Because Highmark had never before stated that it would challenge the MFN clause, Plaintiff and UPMC did not have the opportunity to fully address these issues.

6. In addition, Highmark's response omits significant precedent, fails to acknowledge the weight of the authority on key issues, and relies on long-superseded authority. Highmark's challenge to the value of the MFN clause also mischaracterizes that provision and fails to account for the relevant circumstances of this case.

7. Plaintiff and UPMC respectfully request the opportunity to respond to these new legal arguments and alert the Court to relevant case law. A copy of their proposed reply is attached to this motion as Exhibit A.

WHEREFORE, Plaintiff and UPMC respectfully request that the Court enter the attached proposed order granting leave for them to file a reply to Highmark's response.

Respectfully submitted,

/s/ Rebekah B. Kcehowski
Leon F. DeJulius, Jr. (Pa. No. 90383)
Rebekah B. Kcehowski (Pa. No. 90219)
Anderson T. Bailey (Pa. No. 206485)
JONES DAY
500 Grant Street, Suite 4500
Pittsburgh, PA 15219
Tel: (412) 391-3939
Fax: (412) 394-7959
lfdejulius@jonesday.com
rbkcehowski@jonesday.com
atbailey@jonesday.com

Attorneys for UPMC

/s/ Hamish Hume
Hamish Hume (*pro hac vice*)
Melissa Felder Zappala (*pro hac vice*)
Evan E. North (*pro hac vice*)
BOIES, SCHILLER & FLEXNER LLP 5301
Wisconsin Avenue, N.W.
Washington, DC 20015
Tel: 202-237-2727
Fax: 202-237-6131
hhume@bsflp.com
mzappala@bsflp.com
enorth@bsflp.com

Attorneys for Plaintiff

Kathy Fenton (*pro hac vice*)
JONES DAY
51 Louisiana Avenue, NW
Washington, DC 20001
Tel: (202) 879-3939
Fax: (202) 626-1700
kmfenton@jonesday.com

Paul H. Titus (Pa. No. 01399)
Keith E. Whitson (Pa. No. 69656)
SCHNADER HARRISON SEGAL &
LEWIS LLP
Fifth Avenue Place, Suite 2700
Pittsburgh, PA 15222
Tel: (412) 577-5200
Fax: (412) 765-3858
ptitus@schnader.com
kwhitson@schnader.com

Attorneys for UPMC

Arthur H. Stroyd, Jr. (Pa. No. 15910)
Steven J. Del Sole (Pa. No. 73460)
Patrick K. Cavanaugh (Pa. No. 72960)
DEL SOLE CAVANAUGH STROYD LLC
200 1st Avenue, Suite 300
Pittsburgh, PA 15222
Tel: 412-261-2393
Fax: 412-261-2110
astroyd@dscslaw.com
sdelsole@dscslaw.com
pcavanaugh@dscslaw.com

Andrew M. Stone (Pa. No. 35176)
STONE LAW FIRM, LLC
The Frick Building, Suite 1806
437 Grant Street
Pittsburgh, PA 15219
Tel: 412-391-2005
Fax: 412-391-0853
astone@stone-law-firm.com

Scott M. Hare (Pa. No. 63818)
The Frick Building, Suite 1806
437 Grant Street
Pittsburgh, PA 15219
Tel: 412-338-8632
Fax: 412-338-6611
scott@scottlawpgh.com

David Stone (*pro hac vice*)
David Harrison (*pro hac vice*)
STONE & MAGNANINI LLP
150 JFK Parkway
Short Hills, NJ 07078
Tel: 973-218-1111
Fax: 973-218-1106
dstone@stonemagnalaw.com
dharrison@stonemagnalaw.com

Attorneys for Plaintiff

Dated: April 4, 2016

CERTIFICATE OF SERVICE

The undersigned certifies that, on April 4, 2016, I caused a true and correct copy of Plaintiff's and UPMC's Motion for Leave to File a Reply in Support of Their Motion for Preliminary Approval of Settlement and Related Matters to be served on all counsel of record via the court's electronic filing system (CM/ECF).

/s/ Rebekah B. Kcehowski